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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 8.

MEMPHIS & CHARLESTON RAILWAY COMPANY, *Appellant*,

v.

C. L. PACE, G. C. STEPHENS, R. C. GRISHAM, ET AL.,
Appellees.

Reply Brief to Brief of the Attorney General of the State of Mississippi as Amicus Curiae.

S. R. PRINCE,
JOHN B. HYDE,
Attorneys for Appellant.

L. E. JEFFRIES,
ELY B. MITCHELL,
Of Counsel.

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Reply Brief to Brief of the Attorney General of the State of Mississippi as Amicus Curiae.

May It Please the Court:

Appellant, leave of the Court having been obtained, herewith presents the following reply to the brief of the Attorney General of the State of Mississippi, as *amicus curiae.*

INTRODUCTORY.

The brief of the Attorney General of Mississippi as *amicus curiae* is based on a misconception of the scope

of this litigation. It is based on the assumption that all the special road improvement bond issues in the state are in jeopardy of being declared invalid by this Court.

That this is a misconception needs but a moment's consideration of two points:

(1) The special road improvement bond issues of the state have all been saved by the decision of the majority of the Supreme Court of Mississippi in this case on rehearing (154 Miss. 536) where that court held (a) that since the Board of Supervisors might deny the petition to establish the road district, a property owner was not entitled to notice and hearing within this Court's rule as set out in Browning v. Hooper, 269 U. S. 396, and (b) that the special validating act, Chapter 1080, Laws of 1926, was valid under the Constitution of Mississippi.

This decision of the state's highest court is binding on this Court; it established the validity of the technical *creation* of the Oldham Road District and all other road districts organized under the machinery of Chapter 277, Laws of 1920; and foreclosed the carrying forward by the appellant in the appeal to this Court all those questions which were finally decided by the court which had final jurisdiction of such questions.

(2) The second reason why all the special road improvement district bonds of the State of Mississippi are not in jeopardy of being declared invalid in this litigation is the primary principle that this Court has no power per se to declare acts of state legislatures invalid upon the ground that they conflict with constitutional provisions, and that only one whose constitutional rights have been directly impaired by

state laws, or impositions based upon state laws, is entitled to attack the validity of such laws or impositions in the Federal courts.

This Court has recently said:

> "The federal courts have no power *per se* to review and annul acts of state legislatures upon the ground that they conflict with the federal or state constitutions. 'That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act.'"
>
> *Williams v. Riley,* 280 U. S. 78.

An illustration of the principle just stated is contained in the litigation in Texas subsequent to the decision of this Court in *Browning v. Hooper, supra.* In the case of *Dunn v. Fort Bend County,* 17 Fed. (2d) 329, the bondholders therein conceived that the decision in *Browning v. Hooper* had the effect of declaring similar road bond issues of Texas unconstitutional, but the special court of three judges, convened under Section 266 of the Judicial Code therein, held otherwise, stating:

> "* * * the protection furnished by the due process clause of the Fourteenth Amendment is a purely personal right or privilege, and a condemnation of a statute in a particular case as repugnant to that Amendment as to the plaintiff in it does not, and cannot, affect or impair the statute itself as a valid and existing law * * * except as to the particular person complaining, and as to the particular thing he complains of * * *".

In *Massachusetts v. Mellon,* 262 U. S. 447, this Court said (*loc. cit.* 488):

> "The party who invokes the power (*i. e.*, the power of declaring that an exactment is unconstitutional as applied to the litigant) must be able to show not only that the statute is invalid but *that he has sustained or is immediately in danger of sustaining some direct injury* as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." (Italics added.)

Thus, as has been stated above, to sustain appellant's constitutional rights in this case will not have the effect of invalidating other special bond issues in the State of Mississippi except as to some litigant who may bring himself, on the facts of his case, within whatever principle this Court may apply; but nevertheless, *if it should affect others*, that in itself cannot deter this Court from exercising its right, power, and jurisdiction to protect the constitutional rights of this litigant who is invoking its protection.

Appellant's rights may not be sacrificed to cure a possible invalidity in other bond issues, if such there be.

REPLY BRIEF.

The brief of the *amicus curiae* makes four contentions:

I.

THE ALLEGED NEW POSITION OF APPELLANT IN THIS COURT.

The Attorney General contends that appellant has abandoned its position assumed in the Mississippi courts and attempts to present a new case in this

Court in that it does not renew the assignments of error made in the Supreme Court of Mississippi dealing with the alleged invalidity in the creation of the district.

Appellant's answer to this contention is that it and this Court are bound by the decision of the State's highest court relating to the state Constitution and state statutes and that it is no longer possible here for appellant to contend that the district was invalidly organized or that the special validating act approved as constitutional under the Constitution of Mississippi did not serve to place the Oldham Road District in the class of legislatively created districts.

Appellant's case in the courts below was of double aspect, (1) that the district was invalidly organized both under the laws and Constitution of Mississippi, and for want of notice and hearing in violation of the Fourteenth Amendment, and (2) that *the assessment was violative of appellant's rights under the Fourteenth Amendment.*

As to the first, the decision below is binding; as to the second, this Court only is the final arbiter.

Necessarily, therefore, the appellant here no longer makes the first contention, but it continues to contend here, just as it contended in the amendment to its original bill, that:

> "The assessment made against its land in said road district is plainly arbitrary and unreasonable and discriminatory; the assessment was excessive in itself, or when compared with the assessment against other property. It is a violation of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States."
>
> (*Bill*, R. 17-18.)

It litigated this point in the trial court, and the Chancellor therein having held against the appellant (*Opinion of the Trial Court,* R. 197), appellant renewed the same contention in its assignments of error in the Supreme Court of Mississippi.

> *Assignments of Error,* XII and XIV, R. 208, 209.

The majority of the Supreme Court of Mississippi in the final opinion of that court on rehearing in this case expressly held against this contention of the appellant where it said:

> "We are unable to see that the operation of the statute has worked any arbitrary and unreasonable discrimination against appellant."
> *Memphis & Charleston v. Bullen,* 154 Miss. 536 (R. 240)

There has therefore been a consistent claim by this appellant throughout this litigation of the grounds set up in the Assignments of Error in this Court, and no different case is made here than was litigated below.

The brief of the *amicus curiae* also makes the point that it was not specifically stated in the original bill that the deliberate inclusion in the district of appellant's right of way through Section 29 had the effect of increasing the assessable mileage of the appellant in the Oldham District by 35 per cent. (Brief of *Amicus Curiae,* p. 5-7.)

Appellant concedes that this *evidential fact,* which appellant insists *is* plain evidence of arbitrary action, was not in express terms stated in the face of the original bill.

However, in no system of jurisprudence is there any principle which precludes a litigant, under an allegation well pleaded of arbitrary and discriminatory exaction, from showing *evidential facts which tend to prove the abuse and the discrimination alleged.*

It has been seen above that throughout the progress of this litigation the appellant herein was contending that the assessment as applied to its property was arbitrary and discriminatory. It had the right to, and did, on this issue, its allegation having been expressly denied in the answer, show *all facts* which went to prove this contention.

Among the facts so proved, *and which fact was not and could not be controverted,* was the fact that in the original petition praying for the creation of the district, the boundaries thereof, as then and forever after finally fixed, expressly included an additional eight tenths of a mile of appellant's main track through Section 29 which had the effect of increasing the taxable mileage of appellant in the district by 35 per cent. (R. 71 and 82.)

The statement in the brief of the Attorney General to the effect that the appellant did not argue this question as to the arbitrary inclusion of more of appellant's property in the district than was justified, in the courts below, is incorrect.

Appellant nowhere in this case has made a suggestion that any fraud has been committed against it by the State of Mississippi or any of its political subdivisions. It does insist that it had a right below to present, and has a right in this Court to argue all facts in the record bearing on the question of whether or not the assessment involved in this case

is so arbitrary and so discriminatory as to offend the Fourteenth Amendment to the Constitution of the United States.

Appellant so contended in its pleadings and from the inception of this case; in the trial court below; throughout the arguments there; throughout two arguments in the Supreme Court of Mississippi; throughout its former argument in this Court; *and it still contends the same thing now.*

II.

ALLEGED ESTOPPEL AND LACHES.

The Attorney General in his brief contends that appellant is estopped from contesting this case, by a delay of a year in filing its bill after the Oldham Road District was organized, although it is admitted that the district was organized without any notice of any kind to appellant.

(It is stated in the Brief, page 16, inadvertently, no doubt, that the delay of the appellant was for a year after the "tax was levied". This statement is erroneous, as will be seen hereafter.)

Appellant submits that there is in this record no basis for a charge of estoppel or laches against it. The facts are:

(a) That the petition of 20 per cent of 26 voters for the creation of the district was filed, *without notice to appellant,* on January 4, 1926. (R. 38.)

(b) That 22 voters, 19 for and 3 against, voted for the creation of the district on January 30, 1926 (R. 41, 46). *Appellant had no vote.*

(c) *That the bonds of the district were sold to the Iuka Guaranty Bank on February 4, 1926.* (R. 54-55.)

(d) The appellant, *still without notice of the creation of the district,* for if it had known thereof it would have had to show the fact, filed its return for 1926 taxes with the State Tax Commission as required by law, on or about April 1, 1926 (R. 122.)

(e) The State Tax Commission, *having just heard of the creation of certain new road districts,* sent the following letter to appellant *on June 2, 1926*:

"Dear Sir:

"We are enclosing herewith, description of certain road and School Districts; some of these are new districts; some of them are districts created one or more years ago; *but just reported to this office.*

"Please acknowledge receipt of these descriptions, and if you own no property in the District, please advise us and return the descriptions, and if you do have property in the District, please let us know about when you can furnish us an assessment covering same.

"With best wishes, I am,

"Yours very sincerely,

(Signed) A. S. Coody, Sec."

"Description of the territory embraced in the Oldham Road District, in Tishomingo County, Mississippi, created Feb. 1st, 1926." (Italics added.)

(R. 128-129.)

This was the first notice of the creation of the district which the appellant received (even the State Tax Commission states it had just learned of the "new district") and it was *four months after the*

bonds of the district had been sold to the Iuka Bank and three weeks after the purchaser actually paid the money to the district, which appears to have been on May 10, 1926. (Ex. FF, R. 199.)

(f) Appellant furnished the State Tax Commission the mechanical separation of its property as to this new district *on June 23, 1926, asking that its former return "be corrected accordingly"* (R. 130).

(g) The State Tax Commission's final assessment of all of appellant's property in the state was not made until after a protest by appellant and a hearing had thereon subsequent to June 23, 1926 (R. 123 and Secs. 9386 and 9387, Hemingway's Code of 1927), and under the law the Commission does not deliver the railroads' assessment rolls to the counties until November 15, in each year.

Sec. 9398, Hemingway's Code of 1927.

(h) *The tax levy on which the assessment sought to be enjoined in this case is based was not made by the Board of Supervisors until November 5, 1926* (R. 199-201).

(i) *Within the time required by law, appellant paid its other taxes to the County and on January 7, 1927, notified the taxing authorities that it considered the Oldham istrict assessment invalid* (R. 133).

(k) It appears that *by private law, Chapter 1080, Laws of 1926,* the legislature validated the creation of the Oldham Road District, this private act being approved March 11, 1926. As to this, appellant submits that it was not even charged with notice in law, it being, as aforesaid, *a private law,*

which does not appear in the volume of General Laws of 1926, and the existence of which was actually unknown to appellant until the answer was filed in this cause on December 12, 1927 (R. 18).

The Supreme Court of Tennessee held that:

> " * * * the familiar maxim, that ignorance of the law is no excuse for the breach or non-performance of any agreement, because any one is presumed to know the law, applies only to general public laws, which prescribe a rule of action for the whole community; and that it has no application whatever to special or private laws, which are only intended to operate upon particular individuals. See 1 Sneed, 698-716.
>
> "A special or private law, in this respect, stands upon the same footing with the law of another government. And all the authorities concur, that ignorance of foreign law is deemed to be ignorance of fact; because no person is presumed to know the foreign law, and it must be proved as a fact."
>
> *King v. Doolittle, v Head* (Tenn.) 77 (*loc. cit.* 84-85).

Even assuming, however, that this private law was notice in law to appellant on March 11, 1926 (though it does not appear to have been known even to the State Tax Commission until June 2, 1926), let the above facts be examined to determine what, if anything, the appellant could have done, relative to the assessment against it, after that date and prior to the filing of the bill herein in May, 1927:

As a taxpayer, appellant (assuming that it knew on March 11, 1926, that an attempt had been made to validate the creation of the Oldham Road District,

but which had been created *and the bonds of which had been sold on February 4, 1926*), might have filed some sort of legal proceedings attempting to enjoin the county and the Oldham Road District from expending funds on roads within the district, but its only possible grounds for such attack would have been the grounds later set up in this proceeding relating to the invalidity of the creation of the district, *all of which grounds have been found to be not well founded by the Supreme Court of Mississippi.*

But it could not, on that date nor on any date prior to November 5, 1926, long after the Attorney General of Mississippi admits in his brief that the district funds had been expended, have filed any sort of proceedings asking the only relief which it prays for in this case; that is, attacking *the assessment against its property as a property owner in the Oldham Road District,* for the simple reason that the assessment against its property was not levied until after the latter date—that is, November 5, 1926 (R. 199-201).

In other words, the position of adversary counsel in this case seems to be that in order not to estop itself from an invalid assessment later to be made, a taxpayer must file a suit, not well founded, in order to attempt to seek an injunction against the taxing authorities from paying out money for which they may possibly later levy an invalid tax. Such a position is unheard of and is wholly untenable.

The most that appellant can be held charged with as notice in law, by reason of the passage of the special validating act, was notice that under the Mississippi Constitution the Oldham Road District had been validly created and that all questions as to the technical validity of the creation of the district were

foreclosed. If that is the law now, as it is under the decision in the court below, it was the law from March 11, 1926, when the act was passed and appellant could not have prevailed in any attack on these grounds.

But between March 11, 1926, and November 5, 1926, these being the respective dates of the approval of the validating act and the tax levy, appellant would have had no standing in any court to file a suit on the grounds now before this Court on appeal, viz.: that *the assessment* imposed on its property for the year 1926 by force of Chapter 277, Laws of 1920, is so arbitrary and discriminatory as that it offends the Fourteenth Amendment to the Constitution of the United States. Between those dates it would not have been heard to assert in any court that, though the district was validly organized, appellant yet fancied that an assessment against it in the district, to be made in the future on a basis not yet fixed by the State Tax Commission, *would probably* result in an unconstitutional assessment on its property.

The entire argument as to estoppel and laches is based on an erroneous assumption; viz., that the appellant, prior to the making of the assessment which is attacked in this cause, could have sought the relief as to that assessment now sought in this Court.

It is suggested in the brief of the *amicus curiae* that appellant, during this interim, could have impounded the proceeds from the sale of the bonds of the district. Prior to the date *of the assessment* against its property it could only have impounded these funds as a general taxpayer on the grounds that the district was, for some reason, invalidly organized, *not upon the ground that the creation of the dis-*

trict would later result in unconstitutional assessment against its property in the district. But as to this suggested suit, as has been stated, appellant would not have succeeded because the highest court in the State, *in this cause*, has held that the district *is validly organized* and hence appellant's attack thereon would have fallen to the ground.

When appellant did file its suit it included therein in good faith its many attacks on the validity of the original creation of the district and prayed, moreover, for the relief now insisted upon in this case; viz., relief from the unconstitutional imposition of the special assessment on its property. As to the first branch of its attack, it has been held by the state's highest court that the same was not well founded, and hence appellant cannot be held to be estopped or to have been guilty of laches by failing to take an utterly futile step. As to the other branch of its attack, it could not have contested the unconstitutional assessment before it was made.

As to appellant's right to invoke injunctive relief against an unconstitutional *assessment,* no question whatsoever is raised in the answer or in any contention of the appellees in the lower courts or in this Court, and in fact no such question was even suggested in any of the four separate opinions of the Supreme Court of Mississippi which appear in this record.

It must be borne in mind, moreover, that the assessment sought to be enjoined in this case is the *first annual assessment* with reference to the Oldham bonds, which assessment will recur, so far as appears, every year in the future, until the bonds are paid.

A much stronger case of alleged estoppel against

the property owner came before the Court of Appeals for the Eighth Circuit in *Kansas City Southern Railway Co. v. Ogden Levee District*, 15 F. (2d) 637. There the taxing authorities contended that, the Railway Company having paid taxes in the special levee district *for fourteen years prior to the attack*, it was estopped by such course of conduct from complaining against a particular year's assessment. But the court said:

> "Estoppel is claimed because of the fact that appellants have recognized the district and have paid the levee taxes for approximately 14 years, and during said time bonds have been issued by the district to cover the cost of the levee and improvements subsequently made. The trial court held that appellants could not question the rule of taxation fixed by the state statute, because they had paid these taxes for so many years. *It must be borne in mind that taxes are assessed each year, and each year's tax was based on that year's assessment*, which constituted a new transaction. Each year there was a new right to complain of the new assessment and the new tax. Bonds had been issued originally in the sum of $20,000, and later in the sum of $5,000, to cover the repairing of some breaks and some damage to the levee occurring in the years 1915 and 1916. Appellants had nothing to do with the issuance or with the sale of bonds. The purchasers of the bonds presumably knew that there would be a new assessment each year. *Appellants have paid unjust taxes assessed against them for some 14 years*, and the taxes paid amount to more than the face of the bonds. None of these bonds, however, appear to have been liquidated. There is ample property in the district to pay the bonds, even if the assessments of benefits are fairly and properly apportioned. By the payment of these

taxes during these years, certainly no right has arisen in favor of the bondholders to demand that appellants shall continue to pay a disproportionate share of the taxes. It is immaterial to the bondholders as to the proportion of such taxes which the railway company and the landowners shall bear. They have no interest in such question. Kansas City Southern Ry. Co. et al. v. May et al. (C. C. A.) 2 F. (2d) 680." (Italics added.)

The above case has again come before the Eighth Circuit and its decision therein has been reported since this case was argued before this Court on March 5, 1930. In the later decision the court again invalidates the assessments against the Railway Company *for later years* in the same special district.

> *Ogden Levee District v. Kansas City Southern Ry. Co.*, 39 Fed. (2d) 884. (Decided February 20, 1930.)

In the case of *O'Brien v. Wheelock*, 184 U. S. 450, this Court overturned an argument similar to that of appellees and the Attorney General in this case, to the effect that certain taxpayers were estopped by conduct from asserting an admitted constitutional invalidity in certain assessments, and it was said:

> "*But it is contended that while all this may be so as to the general public, yet that appellees, or some of them, have so conducted themselves that they are estopped from asserting such invalidity, and that the Circuit Court should have enforced the assessments exactly as if the law had been a constiutional enactment.* The bill sought to collect not only the assessments already made, but asked to have further assessments made to pay

the bonds in full, and to maintain and preserve the security; and the court was also asked to declare that the assessments created valid liens upon the lands, and to decree that the bonds sued on were a lien on the assessments and to enforce their collection. In other words, that the court execute the act, either as in itself wholly valid or valid as to these defendants. *We are unwilling to assent to the doctrine of legislation by estoppel. The courts cannot, by the execution of an unconstitutional law as a law, supply the want of power in the legislative department.*" (Italics added.)

The Supreme Court of Tennessee, citing *O'Brien v. Wheelock, supra,* and quoting from a decision of the Supreme Court of Illinois in *Holcomb v. Boynton,* 151 Ill. 300, stating that it would be a novel idea "in the law of estoppel that the doctrine should be applied to a person who has been guilty of no fraud, simply because, under a misapprehension of the law, he has treated as legal and valid an act void and open to the inspection of all", *held that there was no basis for a claim of estoppel by reason of the fact that a taxpayer had paid two or three of the annual assessments against his property* in a special district, and *later* asserted his constitutional rights to attack a subsequent assessment.

Obion County v. Coulter, 153 Tenn. 469.

To paraphrase the above statement of the Supreme Court of Illinois in *Holcomb v. Boynton, supra,* it would be a still more novel idea in the law of estoppel that the doctrine should be applied to a person simply because, under *no* misapprehension of the law, he has treated as legal and valid an act *afterwards found to be legal and valid.*

If it be true that even an express legislative act *validating an assessment* does not estop a taxpayer, as this Court has held in *Road Improvement District No. 1 v. Missouri Pacific R. Co.*, 274 U. S. 188:

> "but, as the legislature could not put aside or override constitutional limitations, the confirmation (by the legislature of an assessment) did not prevent inquiry into the alleged violation of such limitations",

it must be held that there is not the slightest basis in this case for a charge of estoppel, much less laches, against the appellant in this case, simply because it had to wait until the tax was assessed before it attacked it.

The appellant cannot be *estopped* by simply failing to file a futile suit, and it cannot be held guilty of *laches* in failing to bring suit as to an assessment made after November 5, 1926, when it notified the authorities on January 7, 1927, or within two months, that it would not pay the invalid item, and sought the only remedy prescribed in the state jurisprudence, early in the same year.

The taxing authorities have not been misled by any act or conduct *of the appellant*, to their injury. In expending the proceeds of the bonds they relied, as they had a right to do, not on the failure of a railroad company to enjoin them, but on a special act of the legislature, and their reliance thereon has not been misplaced for the highest court of their state has said they were right.

But the failure of the railroad to attempt to enjoin a valid law cannot estop *it* from now contesting an invalid assessment which was not made until after the money was spent.

III.

THE FAILURE OF APPELLANT TO ATTACK THE SPECIAL VALIDATING ACT IN THE BILL.

The Attorney General, in his brief, pages 16-17, makes the statement that the original bill in this case did not attack the constitutionality of the special validating act, Chapter 1080, Laws of 1926. This fact is true, but it has no significance in respect to the issues before this Court.

As has just been seen above, the existence of the special validating act, not printed in the published volume of General Laws of 1926, was first brought to the attention of appellant when the Answer was filed on May 13, 1927. And certainly if appellant did not know of this special act at the time it filed its original bill in this cause, it could not have set up any asserted constitutional invalidity in such special act.

Assuming for the sake of argument, however, that appellant was charged with notice in law of the special act, it was not incumbent on it, nor is it now incumbent, expressly to attack by name in its pleading the constitutional validity of an act passed after the district involved in the litigation was created and the bonds sold, which act merely ratified and confirmed *the basis of assessment* prescribed in Chapter 277, Laws of 1920, which latter act *was* expressly attacked as unconstitutional in the bill. As a matter of fact, it is not incumbent on a party litigant, such as appellant, to assert the invalidity *per se*, and in and of itself, of a merely supplemental and cumulative legislative act in express words in its pleading,

provided the scope of the pleading makes it plain that its attack upon a special imposition is based on the alleged repugnance of the basic legislation to the Constitution of the United States. This is particularly true where, at the first opportunity, the litigant assigns error with reference thereto.

Although appellant submits that, owing to its lack of knowledge of the special validating act, it failed to mention that act by name in its original pleading, nevertheless the record shows that the question of *whether or not the special act was valid was litigated throughout the trial in the Chancery Court below* and that the Chancellor held, contrary to the contention of the appellant, that the special act served to validate the creation of the district.

(*Opinion of the Chancellor,* R. 197.)

To such holding appellant assigned error in the Supreme Court of Mississippi (*Assignments of Error, XIII,* R. 209), and a cursory examination of the opinions of the latter court shows that a large part of the litigation therein raged about the question of whether or not the special act was violative of constitutional rights. The Chief Justice of the Supreme Court of Mississippi holding, in his dissenting opinion (R. 245-246) that the special validating act, as well as the general validating act, was beyond the power of the Legislature.

Carrying the contention further, the appellant, in its Assignments of Error *in this Court,* renews its contention consistently made throughout the progress of this litigation, that both Chapter 277, Laws of 1920, and the two validating acts, both general and special, and all proceedings pursuant thereto which

resulted in the unconstitutional imposition on appellant's property, are invalid as repugnant both to the due process and the equal protection clauses of the Fourteenth Amendment.

In this connection it is not amiss to say again that this Court has held that even *an express legislative validation of a special assessment cannot override constitutional rights.*

> *Road Improvement District No. 1 v. Missouri Pacific R. Co., supra.*

This being true, it is impossible to see the significance of the fact that the appellant failed to attack by name in its original bill the validity of a special law of which it had no actual notice until after it had filed its said bill.

Appellant's contention regarding the law of this case is that the original act, Chapter 277, Laws of 1920, and the validating acts, both general and special, pursuant to which the assessment attacked was made, are in and of themselves violative of the appellant's rights in that they purport to approve the imposition of special assessments for special improvements on an *ad valorem* basis; and, finally, that the assessment itself, imposed under these acts, is so arbitrary and discriminatory that it cannot comport with the standard prescribed by the Fourteenth Amendment.

IV.

THE MISSISSIPPI SPECIAL ROAD IMPROVEMENT DISTRICTS ARE NOT INVALID UNDER THE DOCTRINE OF BROWNING V. HOOPER.

The Attorney General, in his brief, pages 17-20, makes the point that road districts organized under Chapter 277, Laws of Mississippi of 1920, are not similar from a standpoint of constitutional law to those road districts organized under the Texas statute which was involved in the decision of this Court in *Browning v. Hooper, supra.*

This point is readily conceded by the appellant for the reason that the Supreme Court of Mississippi in the decision below (*Memphis & Charleston Railway Co. v. Bullen, supra*) expressly held that the Board of Supervisors of a Mississippi county was vested with authority to *deny* the petition to create the district. Districts thus created, within the discretion of the Board of Supervisors, are, therefore, under this decision, equivalent to legislatively created districts, and hence a taxpayer whose property is included therein *is not entitled to notice and hearing* within the doctrine aforesaid of *Browning v. Hooper.*

The concession of this point, however, *does not affect any issue involved in this case in this Court* for the reason that the appellant herein no longer contends, and is not contending, that the district was invalidly organized for want of notice and hearing.

Its contention here is, as has been stated previously, that special assessments for special improvements cannot be imposed upon its property upon any basis where there is no reasonable presumption that

substantial justice will be done "but the probability is that the parties will be taxed disproportionately to each other and to the benefit conferred".

Gast Realty & Invest. Co. v. Schneider Granite Co., 240 U. S. 55.

And that it is a palpable abuse and an unreasonable discrimination to assess its property for special improvements 62.39 per cent of the total assessment when it owns but 1.9 per cent of the acreage.

Even if the assessment itself in dollars and cents had been expressly imposed upon the appellant's property by legislative act, instead of by the machinery under which the assessment was actually imposed, appellant would still be here making the same contention that it is now making; namely, that the assessment is arbitrary and that the assessment is discriminatory under the two clauses of the Fourteenth Amendment.

No such question was involved in the decision of this Court in *Browning v. Hooper.* But it *was* involved in the many prior decisions of this Court cited in appellant's original Brief, and in particular the precise question was involved in *Road Improv. Dist. No. 1 v. Missouri Pacific R. Co., supra,* and was there resolved adversely to the contention of the Attorney General and of the appellees in this case.

HOLDINGS OF THE COURTS SUBSEQUENT TO THE FIRST ARGUMENT IN THIS COURT.

Appellant takes this opportunity to call to this Court's attention a few cases which have accumulated and been reported since the original argument

in this Court on March 5, 1930, dealing with the issues involved herein.

Reference has heretofore been made to the second decision of the Eighth Circuit in the case of *Ogden Levee District v. Kansas City Southern Ry. Co.*, 39 F. (2d) 884, approving the previous decision as to an earlier year's taxes, as contained in *Kansas City Southern R. Co. v. Ogden Levee District*, 15 F. (2d) 637, which case was cited in numerous places in the appellant's original brief in this case.

In the later decision the court says:

> "We think the invalidity of the tax for the four years here involved is clear. The parties have introduced the evidence on the former trial and some additional evidence. This new evidence has not changed the essence, although it has varied the extent of the injustice of these assessments. As to the discrimination between the railway property and other property in the district, the showing is as follows:

Year	Railway lands	Other lands	Railway %
1923	2,443.50	1,675.99	59%
1924	2,357.75	1,346.20	62%
1925	2,357.75	2,580.80	47%
1926	2,298.22	2,580.90	46%
1927	1,609.24	3,526.06	31%

> "The entire railway property within the district was 24.4 acres, being the right of way and trackage—the trackage consisting of 1.81 miles of main track and about one-third of a mile of side track, while the other acreage taxed ranged from 2,716 to 2,569 in the five years shown on the above table. We cannot look at these figures and escape the conviction that to charge rail-

way property of that small amount and that character with that proportion of taxes for a work which primarily and principally benefits the other property in the district is palpably arbitrary and unreasonable and a taking of property without due process of law. It is confiscation under the cloak of taxation."

Ogden Levee District v. Kansas City Southern Ry. Co., 39 F. (2d) 884 (*loc. cit.* 886).

Again, in a decision handed down on December 9, 1929, which was not published in time for appellant to incorporate the same in its original brief, the Circuit Court of Appeals for the 10th Circuit, in *Straight Creek Drainage Dist. No. 2 v. Chicago, R. I. & P. Ry. Co.*, 36 F. (2d) 650, considered a special assessment against the railroad's property in the district under facts strikingly similar to the facts in the case at bar. The court says:

"It cannot be doubted that the drainage of Straight Creek will result in a direct, immediate and substantial benefit to the agricultural lands and in but slight benefit to the railway company's property. Under these circumstances, an assessment on a basis of either $2,100 or $1,200 per acre against the railway company's property and of $52 per acre against the agricultural lands, of 95% of the cost of the project, was palpably arbitrary and discriminatory, a plain abuse of the taxing power, and violative of the Fourteenth Amendment to the Constitution of the United States. Kansas City Sou. Ry. Co. v. May, *supra*; Missouri Pac. R. Co. v. Road Imp. Dist. (C. C. A. 8), 288 F. 502, 505; Thomas v. Kansas City Sou. Ry. Co., 261 U. S. 481, 484, 43 S. Ct. 440, 67 L. Ed. 758; Kansas City Sou. Ry. Co. v. Road Imp. Dist., 256 U. S. 658, 661, 41 S. Ct. 604, 65 L. Ed. 1151."

Finally, attention is directed to the latest action of this Court on the question of special assessments, embodied in its denial on Monday, October 13th, 1930, of the petitions for *certiorari* of the District of Columbia in the cases of *Dougherty v. American Security & Trust Co.*, reported in 40 F. (2d) 813, and *Dougherty v. Heurich*, 40 F. (2d) 815, (styled in this Court, *Luther H. Reichelderfer v. American Security & Trust Co.*, and *Luther H. Reichelderfer v. Heurich*, Nos. 245 and 246).

In the cases cited, the Court of Appeals of the District of Columbia had, following its decision in the case of *Johnson v. Rudolph*, 16 F. (2d) 525, declared unconstitutional, as palpably arbitrary and unreasonably discriminatory, street paving assessments on the front foot basis against real property in the District of Columbia, these assessments having been made under the provisions of the Act of Congress, 38 Stat. 517, 524, and a subsequent act, 39 Stat. 676, 716, known as the Borland Amendment.

The basis for the Court of Appeals thus declaring assessments made pursuant to the Act of Congress to be unconstitutional was that to apply the front foot basis for paving assessments in blind obedience to the statute, without reference to the peculiar status of the property assessed, constituted practical confiscation of such property. By the denial of the petitions for *certiorari* this Court has refused to overturn these decisions of the Court of Appeals, which decisions cite and rely upon the long line of decisions decided by this Court and cited by the appellant in its original brief herein (*Original Brief of the Appellant*, pages 28-29).

CONCLUSION.

Appellant desires to call attention to a recent expression by the Supreme Court of Tennessee embodying the general principle which governs the scrutiny of the courts with relation to special assessments. It was said:

> "*The power to assess all or a portion of the cost of a local improvement against a property deemed to be specially benefited thereby is one which is subject to great abuse* * * *". (Italics added.)
>
> *City of Nashville v. Roberts*, —— Tenn. ——, 27 S. W. (2d) 1086 (May 24, 1930).

It is respectfully submitted that the assessment attacked in this cause, as imposed on appellant's property, is unconstitutional, and that this Court should reverse the judgment of the court below.

Respectfully submitted:

S. R. Prince,
John B. Hyde,
Attorneys for Appellant.

L. E. Jeffries,
Ely B. Mitchell,
Of Counsel.